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In The

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1434

YELLOW FREIGHT SYSTEM, INC.,
Petitioner,

vs.

BILLY G. BUTLER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, Yellow Freight System, Inc., respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Eighth Circuit entered in this cause on March 18, 1975.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. The opinion is reproduced as Appendix A, p. A1, *infra*. Appendix B, p. A25, *infra*, cites the post-trial memorandum of the District Court.

JURISDICTION

The opinion of the Court of Appeals was entered on March 18, 1975. Petitioner made timely motions for rehearing and for rehearing en banc, both of which motions were denied by Order of the Court of Appeals on April 9, 1975, reproduced as Appendix C, p. A26, *infra*. A stay of issuance of the mandate was granted for thirty (30) days on April 21, 1975, provided that Petitioner make application to the United States Supreme Court for a Writ of Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

How should an employee's § 301 action against an employer and a union be characterized for the purpose of ascertaining the appropriate state statute of limitations to be applied by the federal courts?

II

When does an employee's cause of action for breach of contract brought under § 301 against his employer accrue?

III

May the ruling of the joint grievance committee finding no breach of contract by the employer be set aside in a § 301 action where the employee was not required to establish that his union's conduct amounted to "deliberate and severely hostile and irrational treatment" and, in any event, may the employer be held liable in the absence of any evidence of collusion or conspiracy?

FEDERAL AND STATE STATUTES INVOLVED

The Federal Statute involved is:
Labor Management Relations Act § 301(a), 61 Stat 156, 29 U.S.C. 185(a):

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

The State Statutes involved are:

1. Kansas Statutes Annotated, Section 60-511 (1964): Actions limited to five years. The following actions shall be brought within five (5) years: (1) An action upon any agreement, contract or promise in writing.
2. Kansas Statutes Annotated, Section 60-512 (1964): Actions limited to three years. The following actions shall be brought within three (3) years: (1) All actions upon contracts, obligations or liabilities expressed or implied but not in writing. (2) An action upon a liability created by a statute other than a penalty or a forfeiture.
3. Revised Statutes of Missouri, 1969, Section 516.190: Limitations on actions originating in other states. —Whenever a cause of action has been fully barred by the laws of the state, territory or country in which it originated, said bar shall be a complete defense to any action thereon, brought in any of the courts of this state.

STATEMENT OF THE CASE

This is an action for damages brought by an employee against his local union and his employer under the Labor Management Relations Act § 301 (a), 61 Stat 156, 29 U.S.C. 185(a). Respondent was an over-the-road truck driver originally employed by Watson-Wilson Transportation System, Inc. ("Watson") until he was laid off June 3, 1963. While Respondent was laid off, Petitioner, Yellow Freight System, Inc. ("Yellow"), commenced merger proceedings with Watson, and in March 1965, Yellow received temporary authority from the Interstate Commerce Commission to operate Watson. Petitioner was a party to a collective bargaining agreement between the national teamsters union and the trucking industry in general, entitled National Master Freight Agreement and Central States Area Over-The-Road Supplemental Agreement for the Period of February 1, 1964 to March 31, 1967, App. D, p. A27, *infra*.[1] Article 5, Section 3(a) of this agreement provided that when an employer merges with another carrier "the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved", App. D, p. A27, *infra*. Article 5, Section 3(a)(8) provided the mechanism whereby the parties could present seniority problems arising out of mergers to a Change of Operations Committee for solution, App. D, p. A27, *infra*. It was pursuant to the rulings of that Committee that Petitioner commenced to place the former Watson drivers, including Respondent, on a master seniority list from which they were offered various job locations. After turning down a number of locations, Respondent indicated he would like to be con-

1. The subsequent agreements contained identical provisions relating to the grievance machinery, change of operations authority and the handling of mergers.

sidered for a job at Baxter Springs, Kansas. His seniority position among the Watson drivers was such that he did not commence work for Yellow at its terminal at Baxter Springs until March 29, 1967.[2] Upon commencement of his employment at that time, both his local union and Yellow advised Butler that he had a company seniority date of May 6, 1959 (his date of hire with Watson) for fringe benefit purposes, and that he had a terminal seniority date of March 29, 1967, for bid purposes.

Respondent filed grievance on July 5, 1967, claiming that he was entitled to company seniority for bid purposes under the collective bargaining agreement.[3] The joint Missouri-Kansas Grievance Committee, consisting of three union representatives and three employer representatives (non-Yellow members), App. D, p. A28, *infra*, unanimously denied the grievance, after a hearing on August 2, 1967, App. E, p. A29, *infra*. Under the said collective bargaining agreement, the decision of this joint committee was "final and binding", App. E, p. A29, *infra*. This § 301 action was filed June 8, 1972, App. A, p. A2, *infra*.

DECISION BELOW

Both this Petitioner and the defendant local union separately appealed the jury verdicts of the District Court. The Eighth Circuit Court of Appeals rendered its

2. Respondent is not claiming in this action that he should have been put to work earlier. His complaint, paragraph 9, alleges a breach of the collective bargaining agreement by Yellow occurring March 29, 1967. See opinion of the Eighth Circuit, App. A, p. A2, *infra*.

3. He also filed a grievance claiming entitlement to certain moving expenses, a claim which was also denied by the joint committee at the same time and for the same reasons as their denial of the seniority grievance, App. E, p. A30, *infra*.

twenty-nine (29) page opinion holding as to both defendants that a § 301 action was to be characterized as one based on a written contract, although recognizing that other Courts of Appeals have characterized fair representation suits both as torts and as actions to enforce a liability "created by statute", App. A, p. A5, *infra*. Further, acknowledging that this Court has previously applied an oral contract statute of limitations to a § 301 action, *International Union* v. *Hoosier Cardinal Corp.*, 383 US 696, 16 L Ed 2d 192, 86 S Ct 1107 (1966), the Eighth Circuit refused to agree that 301 actions should always be so characterized, App. A, p. A4, *infra*. Rather the court held the longest possible limitation period of the three alternatives, the Kansas five-year period for written contracts (Kansas Statutes Annotated § 50-511), was applicable. The court then found the "breach of the contract [by Petitioner-Employer] occurred on March 29, 1967, more than five years before suit was filed" (App. A, p. A9, *infra*), but nevertheless rationalized that Respondent's cause of action against the employer did not accrue until after the grievance decision. Again, the court recognized that contrary solutions to this continuing, troublesome problem have been adopted by this Court in *McMahon* v. *United States*, 342 US 25, 96 L Ed 26, 72 S Ct 17 (1951), and by the Courts of Appeals in *Northern Metal Co.* v. *United States*, 350 F. 2d 833 (3rd Cir. 1965) and *Macklin* v. *Spector Freight Systems, Inc.*, 478 F. 2d 979 (D.C. Cir. 1973).

Finally, while purporting to follow *Vaca* v. *Sipes*, 386 US 171, 17 L Ed 2d 842, 87 S Ct 903 (1967), the opinion completely ignores this Court's post *Vaca* decision of *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America* v. *Lockridge*, 403 US 274, 301, 29 L Ed 2d 473, 91 S Ct 1909 (1971) requiring "deliberate and severely hostile and irrational treatment" before there can be established a violation of a union's duty in § 301 actions. With no evidence of collusion or conspiracy[4] and specifically finding no evidence the union acted with malice toward Butler,[5] the court inconsistently concluded that the union was guilty of unfair representation. Thus the unanimous decision of the joint grievance committee was voided not because the union evidenced improper conduct towards Butler but because other Yellow drivers had voiced displeasure about the pending merger, two years prior to the grievance hearing, App. A, A19, *infra*.[6] In affirming the trial court's refusal to instruct in accordance with the above-quoted *Lockridge* language, the court of appeals nullified the teachings of this Court in § 301 actions.[7]

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4. Respondent's conspiracy count against the Employer and the local union was voluntarily dismissed by Respondent, App. A, p. A21, *infra*.

5. The court concluded the record failed to show any evidence to support an award of punitive damages against either defendant, App. A, p. A20, *infra*, and ordered any reference of punitive damages against either defendant deleted.

6. The effect of the decision means that when a union representative has diverse groups of employees, it must remain neutral. Such is contra to *Humphrey* v. *Moore*, 375 US 335, 11 L Ed 2d 370, 84 S Ct 363 (1964).

7. The trial court's colloquy with union counsel shows:

The Court: "Is there any other question?"

Mr. Leary: "Yes, Your Honor. This is on the matter of the showing of union hostility. I must say that I read portions of the depositions of Mr. Butler in cross-examination of him, and I know I believe I asked him if he felt the union had any hostility toward him. And he said no."

The Court: "But I have ruled as a matter of law that *hostility isn't* an element of arbitrary conduct, discriminatory conduct, or bad faith conduct." (Emphasis added.)

REASONS FOR GRANTING THE WRIT

I

A. The Decision Below Is Directly Contrary to the Court's Characterization of § 301 Actions As Based upon Contracts Not Exclusively in Writing for Determining Which Statute of Limitations Is Applicable and to the Federal Labor Policy of Favoring Relatively Rapid Disposition of Labor Disputes.

International Union v. *Hoosier Cardinal Corp.*, 383 US 696, 16 L Ed 2d 192, 86 S Ct 1107 (1966), established that § 301 suits should be governed by state statutes of limitation, and that such a suit "may fairly be characterized as one not exclusively based upon a written contract." 383 US at 706. This conclusion was predicated upon the fact that the identifiable goal of federal labor law contains a preference for relatively rapid disposition of labor disputes. 383 US at 707. In clear and concise language this Court concluded:

> Since state statutes of limitations governing contracts not exclusively in writing are generally shorter than those applicable to wholly written agreements, their applicability to § 301 actions comports with that goal. 383 US at 707.

Hoosier Cardinal dealt with a collective bargaining agreement within the purview of § 301 under which a dispute arose concerning vacation pay and monetary damages. Respondent's instant action involves a similar situation, the applicability of the teamsters' National Master Freight Agreement to a dispute over seniority status and resultant money damages. This collective bargaining agreement manifestly was not complete in all its terms. His own contract of employment with Petitioner Yellow

impliedly incorporated this agreement but was itself oral. To recover against his employer, Respondent had to prove his individual, oral employment agreement, his layoff status extension, and the proof of breach, all of which were outside the scope of the collective bargaining agreement. Yet the Eighth Circuit said it could not agree that this Court really "intended to lock § 301 actions into the oral contracts' limitations period," App. A, p. A4, *infra*. Rather it chose to apply the Kansas five-year written contract statute. This construction contravenes the clear and consistently established principle that collective bargaining agreements are not ordinary contracts tied into neat, complete documents, but rather they are generalized codes that are not the simple product of a consensual relationship. *John Wiley & Sons, Inc.* v. *Livingston*, 376 US 543, 550, 11 L Ed 2d 898, 84 S Ct 909 (1964), quoting from *United Steelworkers of America* v. *Warrior & Gulf Navigation Company*, 363 US 574, 578-579, 4 L Ed 2d 1409, 80 S Ct 1347 (1960). The judgment below is contrary to Congressional labor policy and labor law as well as this Court's ruling in conformity therewith and should be reversed.

B. The Opinion Below Is in Conflict with the Characterization of § 301 Suits by Other Courts of Appeals.

The multitude of different types of state limitations and the complexities created thereby, as predicted by the dissenting opinion of Mr. Justice White (with whom Mr. Justice Douglas and Mr. Justice Brennan joined) in *Hoosier Cardinal*, 383 US at 709, are clearly evident in this case. Federal district courts must apply the choice of law rules of the state in which they sit, *Klaxon Company* v. *Stentor Electric Manufacturing Company, Inc.*, 313 US 487, 85 L Ed 1477, 61 S Ct 1020 (1941); 2 Moore's Federal Practice

¶ 3.07[2].[8] It was not disputed below that Respondent Butler's cause of action against Petitioner Yellow accrued in Kansas when he was given a terminal seniority upon being called to work at Baxter Springs, Kansas. Depending upon how a § 301 suit is ultimately characterized, Kansas has three statutes of limitations that could be applicable to Respondent's cause of action: a three-year limitation for contracts not in writing; a three-year limitation for a liability created by statute; and, a five-year limitation for contracts in writing, *supra*, at 3.

The Sixth Circuit has characterized a § 301 action as one based upon a liability created by statute. *Gray* v. *International Association of Heat & Frost Insulators and Asbestos Workers, Local No. 51*, 416 F. 2d 313 (6th Cir. 1969). Likewise, the Ninth Circuit, in a well-reasoned opinion relying upon legislative history, applied the California three-year statute of limitations applicable to actions based on liability created by statute in a § 303 action (holding the same considerations apply to § 301 as § 303 actions). *Schatte* v. *International Alliance, Etc.*, 182 F. 2d 158 (9th Cir. 1950). To be sure, support for this approach is found in those very cases allowing individual employees to sue under § 301. *Vaca* v. *Sipes*, 386 US 171, 177, 17 L Ed 2d 842, 87 S Ct 903 (1967), refers to the responsibility of a union as a "*statutory duty*". The concurring opinion in *Humphrey* v. *Moore*, 375 US 335, 351, 11 L Ed 2d 370, 84 S Ct 363 (1964) speaks of an individual's right of action as being "derived not from the collective bargaining contract but from the National Labor Relations Act."

8. The federal district court in this case, sitting in Missouri, was governed by Missouri's borrowing statute, R.S.Mo., 1969, § 516.190, which invokes the statute of limitations of the state (Kansas) in which the cause of action accrued. *Jenkins* v. *Thompson*, 251 SW 2d 325 (Mo. Sup. 1952).

Even in *Abrams* v. *Carrier Corporation*, 434 F. 2d 1234 (2nd Cir. 1970), repeatedly cited in the opinion below as authority for holding Respondent's action against his union was to be characterized as contract rather than tort, the Second Circuit applied a New York limitation statute applicable to oral contracts.[9] Moreover, the Second Circuit was very careful to point out that it did not necessarily follow that the breach of contract limitation period would apply to all such suits. 434 F. 2d at 1252, fn. 15.

Finally, the discrepancy in treatment of these § 301 causes of action by the lower courts is indicated in *De Arroyo* v. *Sindicato De Trabajadores Packinghouse, AFL-CIO*, 425 F. 2d 281, 286-287 (1st Cir. 1970). There the First Circuit Court of Appeals, expressly following the *Hoosier Cardinal* rationale of preferring a shorter limitations period, characterized an employee's action against his union as a tort. (Petitioner does not mean to imply that the Respondent's action against it should be characterized as a tort.) This does clearly show the obvious confusion and diverse reasoning being applied by the various Courts of Appeals when confronted with the recurring troublesome issue of which state statute of limitations to apply. How are these actions to be characterized? Should the courts first characterize the cause of an action and then apply the appropriate statute, or should the courts be primarily concerned with finding an appropriate time limitation and then characterize the action to fit the ratio-

9. The language of CPLR § 213(2) of the New York Rules referred to in the Second Circuit's opinion states: ". . . an action upon a contractual obligation or liability express or implied. . ." The courts of New York have held this to be applicable to actions for breach of oral contracts. *Engelhardt* v. *Shields & Co.*, 1966, 50 Misc. 2d 7, 269 N.Y.S. 2d 238; *Brockhurst* v. *Ryan*, 1955, 2 Misc. 2d 747, 146 N.Y.S. 2d 386. The Eighth Circuit's opinion erroneously states that the *Abrams* court "applied the *written* contract period of limitations." Nowhere in that opinion does the Second Circuit so hold.

nale of a short time period? Which state statute controls in a multi-state bargaining agreement encompassing the entire United States where identical causes of action accrue but different limitation periods apply? When is the characterization to be said to be inconsistent with national labor policy? Manifestly, there has developed over the past years irreconcilable conflict among the several Circuits. This Court should not permit such conflict to go unresolved.

II

Does an Employee's § 301 Action Against His Employer Accrue at the Time of the Breach of Contract; Is the Running of the Statute of Limitations Tolled Only During the Period Between the Filing of the Grievance by the Employee and the Joint Committee's Final Decision Thereon; or Is the Statute Tolled Completely Until Such Time As the Employee, at His Option, Elects to File His Grievance and the Decision of the Joint Committee Is Rendered?

The Opinion Below, In Holding That the Cause of Action Either Did Not Accrue Until the Conclusion of the Joint Committee's Action or That the Limitation Period was Tolled, Is Admittedly in Conflict with This Court's Prior Decision As Well As Decisions of Other Courts of Appeals.

Respondent's grievance and his lawsuit herein both identically claim that he was entitled to company seniority for bid purposes as of March 29, 1967, when he commenced working for Petitioner Yellow in Baxter Springs, Kansas, App. A, p. A2, *infra*.

The timing of the filing of the employee's grievance is not limited by the terms of this collective bargaining agreement, App. D, pp. A28-29, *infra*. He filed his grievance on July 5, 1967, App. A, p. A2, *infra*. The Joint Missouri-Kansas Grievance Committee promptly rendered its final decision, App. E, p. A29, *infra*, on August 2, 1967, denying the grievance. This suit was commenced on June 8, 1972, App. A, p. A2, *infra*. To sustain the Respondent's action the court below, after selecting the Kansas five-year written contract limitation period, was then compelled to extend that period still further by holding the accrual of the action did not occur until after the date of the joint committee's decision.[10] Such holding, mixing the concept between "accrual" and "tolling" of a cause of action, is directly inconsistent with and contrary to the decisions of this Court, the federal labor goal of relatively rapid disposition of labor disputes and the decisions of other Circuit Courts of Appeals on this same point.

McMahon v. *United States*, 342 US 25, 96 L Ed 26, 72 S Ct 17 (1951), addressed the identical problem of when a cause of action accrues, i.e. whether the date of injury or the date of rejection of an administrative claim controls.[11] This Court, in rejecting McMahon's claim to the argument his cause of action did not accrue and he could not sue until after administrative rejection, stated ". . . the period of limitation is to be computed from the date of injury". 342 US at 27. The Court stressed:

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10. Although the opinion talks about the accrual date not commencing until after the grievance decision, it confuses "accrual" with the power of the courts to "toll" the running of the statute of limitations, App. A, pp. A10-11, *infra*, fn. 8, 9 & 10.

11. The Clarification Act of March 24, 1943, gave seamen on United States vessels the same rights as those employed on privately owned vessels and provided that such seamen's claims would be enforced pursuant to the provisions of the Suits in Admiralty Act, if administratively disallowed in whole or in part. § 1(a), 57 Stat 45. The Suits in Admiralty Act provided any suit thereunder ". . . shall be brought within two years after the cause of action arises. . ." § 5, 41 Stat 526, 46 U.S.C. § 745.

> Since no time is fixed within which the seaman is obliged to present his claim, under petitioner's position he would have it in his power, by delaying its filing, to postpone indefinitely commencement of the running of the statute of limitations and thus to delay indefinitely knowledge by the Government that a claim existed. 342 US at 27.

Like McMahon, Petitioner Butler, and he alone, had it within his sole discretion and power to postpone indefinitely the commencement of the statute. This collective bargaining agreement did not have any time limit within which an employee was required to file his grievance, App. D, pp. A28-29, *infra*.

Moreover, this indefinite postponement is in direct contradiction to the federal labor goal calling for "relatively rapid disposition of labor disputes." *International Union* v. *Hoosier Cardinal Corp.*, 383 US 696, 707, 16 L Ed 2d 192, 86 S Ct 1107 (1966). Allowing the accrual date to be so postponed emasculates the key purpose of a statute of limitations—to prevent "surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared".[12] *American Pipe and Construction Co.* v. *Utah*, 414 US 538, 554, 38 L Ed 2d 713, 94 S Ct 756 (1974), quoting from *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 US 342, 348-349, 88 L Ed 788, 64 S Ct 582 (1944). In *American Pipe*, this Court stated the proper test to be whether tolling the limitation period in a given context is consonant with the legislative scheme involved. 414 US at 557-558.

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12. The best example of this appears right in the Eighth Circuit's opinion wherein the Court criticized defendants' lack of evidence describing the Change of Operations Committee's decision dating back to September 20, 1966, some six years before suit was filed and seven years before trial, App. A, p. A15, *infra*.

The expansion of this accrual date as far as possible ignores another fundamental principle of federal labor law. Section 203(d) of the Labor Management Relations Act, 61 Stat 153, 29 U.S.C. § 173(d) states:

> *Final adjustment* by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes . . . . (Emphasis added.)

This Court, in reliance upon this Congressional mandate, has proclaimed that a primary goal of federal law is to promote industrial stabilization through the collective bargaining agreement. *United Steelworkers of America* v. *Warrior & Gulf Navigation Company*, 363 US 574, 4 L Ed 2d 1409, 80 S Ct 1347 (1960). These very policies are being seriously undermined when courts apply long periods of limitations so that a party to a § 301 action can go back and have a decision of an arbitrator or grievance committee reviewed years later. Whether one likes it or not, these § 301 suits do vitally affect the arbitration processes under collective bargaining agreements.

The heart of a labor agreement is predicated upon the fact that the parties thereto are attempting to work out an on-going relationship governed by an agreed-upon rule of law. The grievance machinery is vital to this relationship. *United Steelworkers of America* v. *Warrior & Gulf Navigation Company*, 363 US 574 at 580-581. Matters which tend to impede the proper functioning of these relationships or the reliability of the grievance process should be carefully looked at by this Court to ascertain whether the application of the rules of law actually hinder rather than foster federal labor policy.

Petitioner submits the postponement of the accrual of the cause of action herein is just such a hindrance.

Even though Respondent's alleged cause of action was *fait accompli* when he went to work on March 29, 1967, the Respondent's actions alone, over which the employer had no control and after the employer's good faith reliance upon the joint grievance committee's decision, were allowed to thwart completely the policy of federal labor law. In affirming the fact that Respondent could file his grievance at any time, the lower court's opinion simply says that the statute of limitations will not accrue unless and until the employee triggers it by the filing of his grievance.

The lower court correctly states that the question of "accrual" and the related question of "tolling" are federal questions. *Cope* v. *Anderson*, 331 US 461, 464, 91 L Ed 1602, 67 S Ct 1340 (1947). It is in this latter, troublesome area of whether "tolling" should be applied in § 301 actions[13] that the opinion recognizes other Courts of Appeals have afforded different solutions to the same problem faced by the Eighth Circuit. The Third Circuit, in *Northern Metal Co.* v. *United States*, 350 F. 2d 833, 838-839 (3rd Cir. 1965), has held that although the cause of action accrued at the time of injury, the running thereof would be suspended *only* for the period of time that the administrative body had the question under review. This approach is entirely consistent with *McMahon* v. *United States*, 342 US 25, 96 L Ed 26, 72 S Ct 17 (1951), to the effect that the cause of action accrues at time of injury. The District of Columbia Circuit has held in a § 1981 action (another area where Congress has not enacted a statutory period of limitation) that the filing of a complaint with the EEOC suspends the running of the statute

13. This only becomes important if, contrary to the *McMahon* decision, it were to be held that the short period of time between the grievance filing and the committee's decision, the running of the statute of limitations should be suspended.

only for the limited period of time during which the EEOC is investigating. *Macklin* v. *Spector Freight Systems, Inc.*, 478 F. 2d 979, 994, fn. 30 (D.C. Cir. 1973). In *Falsetti* v. *Local Union No. 2026, United Mine Workers*, 355 F. 2d 658, 661 (3rd Cir. 1966), the Third Circuit held that a plaintiff's § 301 claim against an employer and union for violations of the contractual seniority provisions accrued on the date of layoff and was not subsequently tolled. Likewise, the Ninth Circuit has held the breach of a bargaining contract is "total and absolute", and the cause of action accrued in its entirety, at the time the employees were told to leave a job. *Schatte* v. *International Alliance, Etc.*, 182 F. 2d 158, 164 (9th Cir. 1950). Finally in *Franks* v. *Bowman Transportation Company*, 495 F. 2d 398, 405 (5th Cir. 1974), the Fifth Circuit determined with respect to the back pay aspect of a Title VII action that the limitations period was tolled *only* from the time of the filing of the complaint with the EEOC up to the time of the agency's notification that voluntary compliance could not be obtained. Hence, even when it has been felt necessary to toll the running of a statute of limitations, the Circuit Courts have limited the tolled period *only* during the time an administrative agency's handling prohibited a claimant from bringing suit. Respondent Butler's grievance was in the joint committee's hands twenty-nine (29) days, App. A, p. A2, *infra*. Consistent with the rationale of this Court in *McMahon*, 342 US at 28, the maximum period of tolling herein should have been limited to the twenty-nine (29) days. The Kansas five-year statute is still a bar to Respondent's claim.

Cases where the Court has allowed tolling are predicated upon the fact that defendants have done something to induce a plaintiff to refrain from suit, *Glus* v. *Brooklyn Eastern District Terminal*, 359 US 231, 3 L Ed 2d 770,

79 S Ct 760 (1959), or because of fraudulent concealment by the defendant, *Holmberg* v. *Armbrecht*, 327 US 392, 90 L Ed 743, 66 S Ct 582 (1946). See also, *Moviecolor Limited* v. *Eastman Kodak Company*, 288 F. 2d 80 (2nd Cir. 1961). Here Respondent Butler was allowed to toll the statute himself after full knowledge of all the facts and then sue to set aside the grievance decision, predicating his claim upon facts and circumstances dating back to a merger in March of 1965. All this was allowed in the face of repeated declarations by both this Court and Congress that federal labor goals require final and relatively rapid disposition of labor disputes. Certiorari should be granted to consider these important questions affecting the administration of labor law in the federal courts.

III

The Decision Below Is in Direct Conflict with § 301 Decisions in This Court Requiring an Employee to Prove That His Union's Conduct Toward Him Involved Hostility Before He Can Set Aside the Ruling of the Joint Grievance Committee in Favor of the Employer, Especially Where There Is No Question of Conspiracy or Collusion Between the Employer and Union.

At the outset it should be noted that this Court on April 21, 1975, granted certiorari involving, what appears from published reports, a similar issue wherein a decision of a joint grievance committee is being attacked in a subsequent § 301 suit. *Hines* v. *Anchor Motor Freight, Inc.*, No. 74-1025, United States Supreme Court, 43 USLW 3567.

A union's duty of fair representation, first enunciated by this Court in *Steele* v. *Louisville & Nashville Railroad Company*, 323 US 192, 89 L Ed 173, 65 S Ct 226 (1944), requires the bargaining representative "to serve

the interests of all members *without hostility or discrimination*". Almost ten years later the Court reiterated this duty by saying that bargaining representatives must "make an honest effort to serve the interests of all of those members, without *hostility* to any". *Ford Motor Company* v. *Huffman*, 345 US 330, 337, 97 L Ed 1048, 73 S Ct 681 (1953). At the same time the Court recognized there are differences arising which affect individual employees or classes of employees within the bargaining unit, and which make complete satisfaction of everyone not always possible. 345 US at 338. *Humphrey* v. *Moore*, 375 US 335, 11 L Ed 2d 370, 84 S Ct 363 (1964), a similar case dealing with diverse seniority questions after merger,[14] points out that the breach of a union's duty of fair representation must consist of "substantial *evidence of fraud, deceitful action or dishonest conduct*". 375 US at 348. In fact, the concurring opinion of two members of the Court (Mr. Justice Goldberg and Mr. Justice Brennan) questions whether the action should have been treated as a claim for breach of contract at all where "[N]o fraud is charged against the employer. . ." 375 US at 355. Mr. Justice Goldberg pointedly states that even if there was union misconduct, an employer should not be prohibited from putting a grievance settlement into effect, as such would frustrate joint grievance settlements. 375 US at 358. *Vaca* v. *Sipes*, 386 US 171, 177, 17 L Ed 2d 842, 87 S Ct 903 (1967), reiterated the above rulings and went on to hold that an employee does not have an absolute right to demand arbitration absent evidence of personal hostility. 386 US at 194. Finally and most important, this Court defined what is meant by the duty of fair representation by stress-

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14. Like Petitioner Butler's claim not involving any question of collusion or conspiracy between the union and employer, *Humphrey* involved a situation where "no fraud is charged against the employer", 375 US at 343.

ing that it had evolved to enforce the principle that an individual should not suffer "invidious, hostile treatment". *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America* v. *Lockridge*, 403 US 274, 301, 29 L Ed 2d 473, 91 S Ct 1909 (1971). It was further spelled out that a union's breach can be predicated only upon "deliberate and severely hostile and irrational treatment".

The opinion below ignores these cases which consistently contain the requirement that a union's conduct must be found to be "hostile". In truth, the opinion completely failed to consider *Lockridge*, although that decision was strenuously argued to the court by both Petitioner Yellow and the defendant union. Petitioner Yellow was not charged with any collusion or conspiracy, *supra*, fn. 4. In holding that the Employer was not subject to punitive damages, the court's opinion found no evidence that the Employer did anything more than go along with the union's desires, App. A, p. A21, *infra*.[15] The opinion additionally found that the union's conduct toward plaintiff was not malicious and thus voided the punitive damage award against the union.[16] These findings, together with the trial court's ruling as a matter of law that "hostility" was not an element of arbitrary or discriminatory conduct, *supra*, fn. 7, adds a completely new, and heretofore unheard of, standard to be followed in § 301 cases.

If allowed to stand, the decision below has far-reaching effect on national labor policy. It means that an employer can be held liable years later after relying on the unani-

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15. Both of these factors were emphasized by this Court in its decision in *Humphrey* v. *Moore*, *supra*, 375 US at 348.

16. It is interesting to note in this context the opinion's comment that the union conduct amounted to nothing more than was favoring one group of members over another, App. A, p. A21, *infra*.

mous decision of a joint grievance committee, even though it is not charged with, nor was there evidence of, collusion, fraud or conspiracy. The end result of this will nullify the effectiveness of arbitration as a means of industrial peace and stability. Also, by allowing such a § 301 action to be maintained, without the required proof of union hostility, simply means that a union will now have to remain essentially neutral in its representation with respect to diverse groups of employees within the bargaining unit.

CONCLUSION

Both the statute of limitations question creating conflicts in the decisions of the several Courts of Appeals as well as the important fair representation questions arising from the decision below should be reviewed by this Court. Both questions raise substantial issues concerning national labor policy involving courts, employees, unions and employers alike.

For the reasons set out herein, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 74-1342 and 74-1567

Billy G. Butler,
Appellee,

v.

Local Union 823, International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and
Helpers of America,
Appellant,

and

Yellow Freight System, Inc.,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: November 12, 1974
Filed: March 18, 1975

Before VAN OOSTERHOUT, Senior Circuit Judge, HEANEY, Circuit Judge, and MEREDITH, Chief District Judge.*

*JAMES H. MEREDITH, Chief Judge, Eastern District of Missouri, sitting by designation.

HEANEY, Circuit Judge.

Billy G. Butler brought this action against his employer, Yellow Freight System, and against Teamsters Local 823, alleging that Yellow had breached certain terms of its collective bargaining agreement and that the Local had failed to fairly represent him in the processing of his resultant grievances. The jury returned verdicts against both defendants.[1]

Butler's former employer, Watson-Wilson Transportation Systems, merged with Yellow in 1966, at a time when Butler was on layoff status. Butler was called to work for Yellow at its terminal in Baxter Springs, Kansas, in March of 1967. Yellow granted Butler a company seniority date of May 6, 1959 (his date of hire with Watson-Wilson) for fringe benefit purposes, but granted him a terminal seniority date of March 29, 1967, for bid purposes. Butler filed a grievance on July 5, 1967, claiming that he was entitled to company seniority for bid purposes under the collective bargaining agreement.[2] The grievance was denied by the Missouri-Kansas Grievance Committee after an August 2, 1967, hearing. This lawsuit was commenced on June 8, 1972.

The appellants assert: (1) that the actions against the Employer and the Local were barred by the appropriate

1. The jury awarded $6,500 actual and $30,000 punitive damages against the Local, and $28,000 actual and $7,000 punitive damages against the Employer. The District Court amended judgment after trial to provide that Butler's seniority date for all purposes was to be May 6, 1959.

2. Butler also claimed that he was entitled to certain moving expenses, a claim which was denied by the Grievance Committee, but subsequently upheld by the District Court. The appellants do not devote space in their briefs to refuting this claim, and, in its discussion of the merits, this Court will address only the seniority portion of the underlying dispute.

statutes of limitations; (2) that the court erred in its instructions as to the legal effect of the collective bargaining agreement; (3) that the instructions were improper and that there was not sufficient evidence on the issue of fair representation; (4) that the award of punitive damages was erroneous; and (5) that the scope of post-trial equitable relief was too broad. We affirm the actions of the trial court, except for its award of punitive damages.

I. THE STATUTE OF LIMITATIONS.

The trial court held that the action against each defendant was "based on a written contract," and that it was not necessary to determine whether the law of Missouri (the forum state) or the law of Kansas governed, since both states provided a five-year period for actions based on written contracts. *See* Rev. Stat. Mo. §516.120; Kans. Stat. Ann. §60-511. The court further held that, under the doctrine of *Vaca v. Sipes*, 386 U.S. 171, 186-187 (1967), Butler had no "fully vested" cause of action against the Employer or the Local until Butler had exhausted the grievance procedures. Since the adverse Grievance Committee decision was rendered within five years of Butler's commencement of suit, the court held that the suit was not barred. We agree that neither action was barred.

Because there is no federal statute of limitations governing §301 breach of contract actions or governing fair representation actions, the timeliness of such suits is governed by the "appropriate" state statute of limitations. *International Union v. Hoosier Cardinal Corp.*, 383 U.S. 696, 704-705 (1966). This search for the "appropriate" statute requires determination of several sub-issues, some of which are controlled by federal law, and others by state law.

A. THE CHARACTER OF THE CAUSE OF ACTION AGAINST THE EMPLOYER.

When a plaintiff sues on a federal cause of action, the character of the action—*e.g.*, whether it is one in "tort" or in "contract"—is a federal question. *International Union v. Hoosier Cardinal Corp., supra* at 706; *Abrams v. Carrier Corp.*, 434 F.2d 1234, 1251-1252 (2nd Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971). The task is to select the characterization which "best effectuates the federal policy at issue." *Vanderboom v. Sexton*, 422 F.2d 1233, 1237 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970), *quoting Charney v. Thomas*, 372 F.2d 97, 100 (6th Cir. 1967). The District Court's decision to apply the written contract statute of limitations to the action against the Employer does this. The Supreme Court in *International Union v. Hoosier Cardinal Corp., supra*, did apply an oral contract statute of limitations to a §301 action, but it did not purport to lay down a universal rule.[3] Here, the determination of whether or not the Employer had in fact breached the collective bargaining agreement depended entirely on an interpretation of the written documents which comprised that agreement. Thus, as in *Sandobal v. Armour & Co.*, 429 F.2d 249 (8th Cir. 1970), the action against the Employer was properly characterized as one on a written contract.

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3. Nor can we agree that the Supreme Court intended to lock §301 actions into the oral contracts' limitations period when it said that "relatively rapid disposition of labor disputes is a goal of federal labor law." *International Union v. Hoosier Cardinal Corp.*, 383 U.S. 696, 707 (1966). The Court was there forced to choose between Indiana's five-year period for oral contracts and its twenty-year period for written contracts. Its finding that the twenty-year period was not the most appropriate one to further federal labor policy cannot be taken as a blanket rejection of the written contract characterization in other states where, as in Missouri and Kansas, the yardstick is a significantly shorter five years. Indeed, five years was viewed by the *Hoosier* Court as "relatively rapid."

B. THE CHARACTER OF THE CAUSE OF ACTION AGAINST THE LOCAL.

The proper characterization of the fair representation action against the Local is more difficult, and is an issue which has divided the Circuits. The First and Fifth Circuits have held that a fair representation action against a union, even when coupled with a breach of contract action against an employer, is properly characterized as a tort action, notwithstanding the fact that the disparate characterizations may result in a longer period of vulnerability for the employer than for the union. *See Sanderson v. Ford Motor Co.*, 483 F.2d 102, 114 (5th Cir. 1973); *De Arroyo v. Sindicato de Trabajadores Packinghouse, AFL-CIO*, 425 F.2d 281, 286-287 (1st Cir.), *cert denied*, 400 U.S. 877 (1970). On the other hand, the Second Circuit has held that the actions against employer and union ought to be of the same duration, and, therefore, has applied the written contract period of limitations to a fair representation action where that action was joined with a breach of contract suit against the employer.[4] *See Abrams v. Carrier Corp., supra* at 1251-1253. *Accord, Dudley v. Woods Industries, Inc.*, Civ. No. KC-3491 (D. Kan., March 20, 1974); *Buchholtz v. Swift & Co.*, 62 F.R.D. 581, 602-604 (D. Minn. 1973) (dictum).

We acknowledge that the arguments in *De Arroyo* favor characterizing the unfair representation action as a tort. The gist of the action is malicious, arbitrary or fraudulent conduct injuring the employee. The action ex-

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4. The Sixth Circuit has held, without discussion, that a fair representation action is properly characterized as one to enforce a liability "created by statute." *Gray v. International Association of Heat & Frost Insulators & Asbestos Workers, Local No. 51*, 416 F.2d 313, 316 (6th Cir. 1969). We reject that characterization here for the same policy reasons for which we reject the tort characterization.

ists independent of the §301 action against the employer, and the union need not be sued in order to sue the employer. *Vaca v. Sipes, supra* at 186-187. Moreover, there will be instances in which the action against the employer is really only incidental to the primary claim that the union has breached its duty of fair representation. In such instances, it may be "letting the tail wag the dog" to extend the union's period of vulnerability by tacking on an incidental §301 claim against the employer.

Yet, despite the logic of these arguments, we conclude, as did the District Court, that the policies underlying federal labor law will be best effectuated by applying the written contract statute of limitations to the action against the Local. We reach this conclusion for the following reasons:

First, it is clear since *Vaca v. Sipes* that to recover against his employer, an employee will first have to establish that the union has breached its duty of fair representation. Thus, the traditional argument favoring statutes of limitations—that claims based on stale evidence ought to be barred—is simply not applicable. The "stale evidence" is necessary anyway. *See Abrams v. Carrier Corp., supra* at 1252; *Buchholtz v. Swift & Co., supra* at 603.

Second, the damages assessed against the union are inextricably tied to the breach of contract. If a court determines that the employer has not breached the contract, even if the union has breached its independent duty of fair representation, the employee will not be entitled to collect from the union damages flowing from the alleged contract breach. *See Vaca v. Sipes, supra* at 198.

Third, only by providing the same limitations period against both employer and union, will the court be able to fashion a remedy which properly allocates the damages

between them.[5] In instances where the employer has acted entirely in good faith in its interpretation of the contract, it will be protected if the union has fairly represented the employee, but it will be vulnerable if the union has acted unfairly. Because the good faith employer's liability is dependent on the union's conduct, there is an inherent unfairness in a rule which would allow the union to raise a limitations defense while denying such a defense to the employer. The Supreme Court in *Vaca* recognized the importance of having both defendants before the court:

> * * * [I]t is obvious that the courts will be compelled to pass upon whether there has been a breach of the duty of fair representation in the context of many §301 breach-of-contract actions. If a breach of duty by the union and a breach of contract by the employer are proven, the court must fashion an appropriate remedy. Presumably, in at least some cases, the union's breach of duty will have enhanced or contributed to the employee's injury. What possible sense could there be in a rule which would permit a court that has litigated the fault of employer and union to fashion a remedy only with respect to the employer? * * *

Id. at 187.

The Court continued:

> The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus,

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5. Indeed, if the "tail has wagged the dog," the apportionment of damages between union and employer ought to reflect that fact, thus diminishing the *De Arroyo* court's objection to the longer statute of limitations. *See Vaca v. Sipes*, 386 U.S. 171, 198 (1967).

> damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer. * * *

Id. at 197-198.

The goal of fairly apportioning damages will best be met by a rule which subjects both defendants to an equal period of vulnerability to suit.

Finally, the retention of congruent jurisdiction over the unions will encourage them to represent employees fairly and completely in arbitration proceedings.

> We, therefore, hold, as did the Second Circuit, that * * * when a §301 suit is brought against an employer alleging breach of the collective bargaining agreement in conjunction with a claim that the union breached its fair representation duty to pursue the employee's grievance, the same period of limitations should be applied to both claims. * * *

Abrams v. Carrier Corp., supra at 1252.

We stress, as did that court, that this rule does not have application to all fair representation suits and that, in other contexts, the tort characterization, the "statutory duty" characterization, or some other characterization might be more appropriate. *Id.* at 1252 n.15. Since both Missouri and Kansas statutes provide that written contract actions must be brought within five years, we need not determine which of the two states' statutes is the governing one.[6]

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6. Unlike the question of characterization, the question of which law governs as between two states is purely state question.

(Continued on following page)

C. ACCRUAL OF THE CAUSE OF ACTION AGAINST THE EMPLOYER.

The question of when a federal cause of action "accrues" and the related question of whether it is "tolled" by subsequent events, are federal questions. *See Cope v. Anderson,* 331 U.S. 461, 464 (1947); *Donaldson v. O'Connor,* 493 F.2d 507, 529 (5th Cir.), *cert. granted,* 42 L.Ed.2d 138 (1974) (No. 74-8); *Antonioli v. Lehigh Coal & Navigation Co.,* 451 F.2d 1171, 1175 (3rd Cir. 1971); *Vanderboom v. Sexton, supra* at 1240.

The action against the Local obviously could not have accrued until the Local engaged in the acts of unfair representation in the grievance process. The date of accrual in this case is August 2, 1967, the date when the grievance was rejected. Therefore, the action against the Local is not barred by the five-year statute of limitations which we have held applicable.

The action against the Employer presents more difficulty, however, for the initial breach of the contract occurred on March 29, 1967, more than five years before suit was filed. There are three ways to approach accrual of the cause of action against the Employer:

First, it could be said that the cause of action accrued when the contract was breached on March 29, 1967, and

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Footnote Continued—

Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941). We note that if we were to characterize the action against the Local as one in tort or to enforce a statutorily created liability—actions for which Missouri and Kansas statutes of limitations differ in length—we would confront problems of interpretation under the Missouri "borrowing statute." Rev. Stat. Mo. §516.190. For cases involving federal causes of action which have grappled with such statutes, see *Cope v. Anderson,* 331 U.S. 461, 466 (1947); *Sack v. Low,* 478 F.2d 360 (2nd Cir. 1973).

that the statute of limitations was not tolled by any subsequent events.[7]

Second, it could be said that the cause of action accrued when the employer breached the contract on March 29, 1967, but that the running of the statute was suspended during and only during the period between the filing of the grievance on July 5, 1967, and the rejection of the grievance on August 2, 1967.[8]

Third, it could be said that the cause of action did not accrue until the grievance was rejected on August 2, 1967, since only then had the necessary condition precedent to suit—rejection of the grievance due to unfair repre-

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7. In urging this approach, the Employer cites *McMahon v. United States*, 342 U.S. 25 (1951). There, the Supreme Court held that, under the Suits in Admiralty Act, a sailor's cause of action for damages arose when he was injured—not at a later date when his administrative claim was rejected. Hence, the statute of limitations ran from the date of injury. However, that Act itself provided a federal statute of limitations, unlike §301.

The Supreme Court in *McMahon* stressed two important features of the Act's scheme: (1) the sailor was not required to file his administrative claim within any set time, and, therefore, a contrary rule would permit him to extend the statute of limitations intolerably merely by delaying filing of his claim; and (2) the Act provided that if his claim was not ruled on within sixty days, it was to be deemed rejected and, therefore, the government agency would not be able to consume the limitations period by its own delay.

8. The Third Circuit adopted this approach in a novel decision under the Suits in Admiralty Act. *Northern Metal Co. v. United States*, 350 F.2d 833, 838-839 (3rd Cir. 1965). It declared that this holding was consistent with the Supreme Court ruling in *McMahon v. United States, supra* note 7, that the cause of action accrued at the time of injury. The virtue of this approach is that a plaintiff cannot extend the statutory period by means of his own delays, but the delays of the administrative body will toll the running of the statute.

The District of Columbia Circuit has also used this approach in a §1981 case where a complaint had been filed with the EEOC. *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 994 n.30 (D.C. Cir. 1973).

sentation—taken place.[9] This was the approach taken by the District Court.[10]

We have concluded that the District Court adopted the proper approach in holding that Butler's cause of action against the Employer did not accrue until his grievance was rejected and the necessary condition precedent to suit had been met.[11] Our reasons for reaching this conclusion are threefold:

First, the rule that the cause of action against the Employer accrues at the same time as does the cause of action against the Local preserves the symmetry seen necessary to the furtherance of federal labor policy in part I-B of this opinion. If either of the other two approaches to accrual were adopted, the employee's action against the union would persist after the action against the employer had expired. It would be irrational to adopt a rule which would leave the union as the only defendant after first applying a longer statute of limitations to the union's conduct for the very purpose of assuring that both defendants are equally vulnerable.

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9. The Supreme Court has utilized this technique in a government contract suit. *Crown Coat Front Co. v. United States*, 386 U.S. 503, 518-522 (1967). It stressed that the facts were distinguishable from *McMahon v. United States, supra* note 7, because there was a time limit within which the claimant was required to file an administrative claim, and there was no time limit within which the administrative body was required to act.

10. Another way of construing the District Court's action is to say that it tolled the running of the statute until grievance procedures were exhausted. Federal courts clearly have the power to toll statutes of limitations. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 559 (1974).

11. The cause of action accrued when the employee had exhausted those steps in the grievance procedure which he had power to invoke, for *Vaca v. Sipes, supra* at 185, requires only exhaustion of such steps. *See also Dill v. Greyhound Corp.*, 435 F.2d 231, 237 (6th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971).

Second, the underlying policies of federal labor law will not be furthered by enmeshing §301 breach of contract actions in technicalities that operate to the disadvantage of plaintiffs who have acted entirely in good faith in following the contract's command that they first submit their grievance to the arbitration process. As in *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 994 n.30 (D.C. Cir. 1973), we are not dealing with a clear expression of congressional intent as to limitations, since Congress has not enacted any statute of limitations applicable to §301 actions. Instead, we are forced to create limitations as a matter of judicial implication, and we must be guided in that process by the policies and goals of federal labor law.

Third, common sense indicates that there is no accrual until all facts exist so that the plaintiff can allege a complete cause of action. Those facts did not exist here until the union had acted unfairly in the processing of the grievance. The Employer calls our attention to cases involving "notice statutes"—for example, providing that a municipality may not be sued until it is served with notice—and relies on holdings in those cases to the effect that the cause of action accrues when the damage occurs, and not when notice is finally given. *See, e.g., Welch v. Kansas City*, 204 Kan. 765, 465 P.2d 951 (1970). Those cases are inapposite, however, for the only act necessary to perfect the plaintiff's cause of action in such cases is an act which is to be entirely performed by the plaintiff; thus, it is felt that he must not be allowed to indefinitely suspend the running of the statute by delaying performance of the act. Here, not only is the condition precedent to suit a matter which is entirely beyond the plaintiff's control, but furthermore, the plaintiff should obviously not be required to anticipate that the union

will act unfairly in representing him. On the contrary, the employee has every right to expect that the union will fulfill its duty properly, and that there will be no occasion for a §301 suit.[12] *Cf., Gainey v. Brotherhood of Railway & Steamship Clerks*, 275 F.Supp. 292, 307 (E.D. Pa. 1967), *aff'd*, 406 F.2d 744 (3rd Cir. 1968), *cert. denied*, 394 U.S. 998 (1969).

We, therefore, conclude that the District Court was correct in holding that neither the action against the Employer nor the action against the Local was barred by the appropriate statute of limitations.

II. THE INSTRUCTIONS ON THE LEGAL EFFECT OF THE CONTRACT.

The collective bargaining agreement in effect during the merger process in 1965 and 1966 provided in Article V §3(a) that, in the event of merger, the seniority of affected employees was to be determined by "mutual agreement" between the employers and the union, in accordance with the following general rules:

> §3(a)(1) If both carriers involved are solvent then the seniority lists of the two Companies should be dovetailed so as to create a Master Seniority List based upon total years of service with either Company. This is known as dovetailing in accordance with years of seniority. * * *
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> * * *

12. The one remaining residue of *McMahon v. United States, supra* note 7, is that there apparently is no provision in the collective bargaining agreement requiring the employee to submit a grievance within any time limit. Thus, there is a possibility that an employee will be able to extend the time limits of the statute by delaying his filing of a grievance. This power of the employee does not present a serious problem, however, for the union and the employer may agree by contract to a reasonable fixed time limit within which grievances must be filed.

> §3(a)(8) The parties acknowledge that specific situations may arise which may not be covered by the above rules, or in which the parties may feel that different treatment of the problem is necessary. * * * The Change of Operations Committee * * * shall have the authority to add to or modify these rules in specific situations presented to it.

When the Change of Operations Committee was first presented the facts regarding the proposed merger, it issued a written ruling on June 16, 1965, consistent with the contract:

> * * * All displaced employees * * * shall be placed on the Master Seniority [List] with the original date of hire, regardless of the terminals they may have worked in where they had accumulated only terminal seniority * * *.

By September of 1966, approximately seventeen former Watson-Wilson employees, not including Butler,[13] were working at the Baxter Springs terminal of Yellow, but their names had not yet been dovetailed with those of the Yellow drivers at that terminal.[14]

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13. It is not contended that Butler was entitled to recall to the Baxter Springs terminal at that time.

14. The defendants urged that separate seniority lists were required by the contract because the companies were operating under nonparallel rights and the ICC had not yet finally approved the merger. They contend that the instructions erroneously fixed the date of final ICC approval and hence erroneously fixed the date on which dovetailing was required. The court disagreed, ruling that dovetailing was required under the contract long before the ICC finally approved the merger on October 10, 1968. We do not believe that the issue of *when* the rosters were to be consolidated is relevant to the issue of *which* employees were to be granted company seniority. Hence, any mistake as to the date of final ICC approval is not relevant.

On September 20, 1966, another Change of Operations Committee meeting was held in Chicago. No minutes of that meeting were produced and, unlike the June 16, 1965, meeting, it did not result in the issuance of a written decision. The evidence as to what took place at that meeting was slight, and dealt only with its purported outcome. Mr. Melton, then a Vice President for Watson-Wilson, testified that

> * * * the decision was that all those employees presently working at St. Louis, Chicago, and Baxter Springs would be dovetailed in line with their full company seniority and any employees accepting job opportunity after that date would go to the bottom of the list for terminal seniority and [would have] company seniority for his [sic] fringe benefits.

The Local had apparently not reached the same conclusion as to the outcome of that meeting, for on September 26, 1966, Local representative Kitts posted a roster in which only the first nine of the seventeen former Watson-Wilson drivers already working at Baxter Springs were dovetailed with the Yellow drivers. The remaining eight were given terminal seniority for bid purposes. Several of the latter employees filed grievances, and the union and Employer subsequently agreed to grant them company seniority.[15] The result was a roster on December 16, 1966, which

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15. The record is murky as to how this change came about. Local representative Kitts testified that Mr. Roy Williams, Chairman of the union bloc on the Grievance Committee, informed him that he had been mistaken in his interpretation of the Committee's September 20 decision, and that all currently working employees were to be dovetailed. Mr. Smith, who was one of the former Watson-Wilson employes originally denied company seniority by the September 26 roster who filed a grievance, testified that

> * * * Brother Williams got up and said it was sort of fouled up and they would have to go back to Chicago to the original Change of Operations Committee, at least that's what I understood him to say.

dovetailed all the former Watson-Wilson employees *then* working for Yellow at Baxter Springs with the Yellow drivers.

The court instructed the jury in effect that, when recalled to work at Baxter Springs on March 29, 1967, Butler was entitled to be granted his company seniority by the provisions of the collective bargaining agreement and the relevant Change of Operations decision, and that Yellow breached the contract if it did not afford him such seniority. The appellants object to this instruction, claiming that it removed the only significant issue from the jury—whether it made any difference that Butler came to Baxter Springs after the purported September 1966 cutoff date.

We find no error in the court's legal conclusion that the contract was unambiguous. Article V §3(a)(1) directly covers the situation which arose when Butler was called to work. Yellow claims that Article V §6 authorizes less than full seniority, but that provision deals only with instances where a branch or terminal of the company is closed, and was plainly not applicable to the merger here. Since the contract was not ambiguous,[16] it was proper for the court to instruct the jury as to its meaning and effect. *See Motor Carriers Council of St. Louis, Inc. v. Local Union No. 600*, 486 F.2d 650, 653 (8th Cir. 1973).

Yellow claims, however, that the September 20, 1966, "decision" of the Change of Operations Committee altered the terms of the contract, and that the instructions were defective in failing to even mention this decision. We

16. For the same reason, there was no abuse of discretion in the court's exclusion of oral testimony offered to show industry practices in other mergers and offered to explain other Change of Operations Committee decisions which were allegedly analogous.

do not agree. The trial court's reasoning in removing the issue of contract-alteration from the jury is not expressed on the record. It seems clear, however, that the purported contract alteration was ignored for one of two reasons: (1) there was not sufficient evidence to permit a finding that the contract had indeed been altered; or (2) there was not sufficient evidence to permit a finding that the Committee had complied with the conditions of §3(a)(8) in modifying the contract.[17] We conclude that failure to instruct on the September 20 decision was proper under either theory.

First, the defendants' proof of the decision was entirely dependent on the oral testimony of two witnesses—Mr. Kitts and Mr. Melton. Within days of the purported decision, Mr. Kitts took part in the posting of a roster which was inconsistent with the defendants' version of what that decision had held. We need not determine the degree of formality which is necessary for the Committee to modify the contract, but surely a written record of some type is necessary—whether a formal written decision, as employed in June of 1965, an exchange of correspondence, or the minutes of the meeting. Only when the decision is reduced to some permanent form will affected persons be adequately informed of the modification. Assuming that the District Court was relying on this approach, we agree that the testimony of Kitts and Melton was insufficient, as a matter of law, to support a finding that the contract had been modified.

17. While we are not faced with the issue, it seems clear that there is a third theory protecting employees in the contract-modification process. For, even without the conditional language of §3(a)(8), under the fair representation doctrine it seems clear that the Committee could not modify the contract in an irrational way in order to discriminate against an employee or group of employees.

Second, we read §3(a)(8) to limit the Committee's power to those specific situations which are not covered by the rules, or in which "the parties may feel that different treatment of the problem is necessary." Since the rules clearly covered Butler's recall, the power to alter the contract could only be triggered by the latter condition; the cutoff line between employees recalled by September 1966 and employees recalled thereafter had to be rooted in necessity. The defendants made no showing that it was necessary to treat Butler in a different manner than his predecessors; indeed, they did not even attempt to demonstrate that the Committee *felt* that different treatment was necessary. Not only was there no showing of necessity, but the record is devoid of any rational explanation for the cutoff imposed here and counsel for the appellants was unable to advance any explanation at oral argument. Under these circumstances, the District Court would have been correct in holding that the September 20, 1966, action of the Committee was not in accordance with the contract. Hence, the explicit provisions of Article V §3 (a) (1), as implemented by the earlier Change of Operations decision, were controlling. The instructions adequately apprised the jury of the meaning of the contract.

III. PROPRIETY OF THE INSTRUCTIONS AND SUFFICIENCY OF THE EVIDENCE ON THE ISSUE OF FAIR REPRESENTATION.

The appellants assert that the court's instructions on the issue of unfair representation were inadequate. We have examined them carefully and find that there was no error. The court instructed the jury that the Local had "a legal duty fairly to represent the plaintiff without arbitrariness, discrimination, or bad faith * * * in the processing of his complaint and grievance," and that the

jury could not find the Local liable unless it found that the Local had breached that duty. In giving these instructions, the court employed the language of the Supreme Court in *Vaca v. Sipes, supra* at 190. We cannot agree with the appellants that, in the circumstances of this case, further definitions of "arbitrary," "discriminatory," or "bad faith" were required. Furthermore, the court correctly stressed to the jury that it could not find Yellow liable unless it first found that the Local had failed to represent the plaintiff fairly.

The evidence viewed most favorably to the jury verdict on the issue of fair representation supports it. Kitts testified to an atmosphere of antagonism among Yellow drivers after the first Change of Operations Committee decision in 1965:

> * * * I had quite a lot of trouble with the Yellow Freight drivers * * *. Everybody knew that Watson drivers had a lot of seniority, Watson was an old line * * * and they didn't want any of them down there. * * * [T]hey felt that they had no reason to be there * * *. And there was a lot of dissatisfaction amongst the drivers, and well, it got pretty bad. They was about ready to throw me out of the hall, and the president of our local, too, because they absolutely didn't want to lose any of their work. * * *

The jury could logically infer that this hostility against Watson-Wilson employees was given an outlet in the Local's aborted attempt in the September 26, 1966, roster, to cut off eight of those former employees who were already working at the Baxter Springs terminal. Butler testified that Local President Webb "guaranteed" that his grievance would be rejected, and told him flatly that he

could not attend the Grievance Committee hearing. There was adequate evidence from which the jury could find that the Local was continuing to protect Yellow drivers—this time at the expense of Butler—and that the Change of Operations Committee alleged decision of September 1966 was an irrational and discriminatory one which the Local failed to contest on Butler's behalf because it did not wish to antagonize Yellow drivers.[18] In short, the jury could find that the Local had breached its duty to insist that the Employer adhere to the contract, and had acquiesced in an irrational interpretation of the contract, thereby discriminating against Butler.

We stress, however, that we do not hold here that the mere fact that a District Court ultimately disagrees with a union's interpretation of a collective bargaining agreement is sufficient in and of itself to establish a case of unfair representation.

IV. THE AWARD OF PUNITIVE DAMAGES.

Assuming arguendo that there will be instances in which punitive damages are proper in a §301 or unfair representation action,[19] we conclude that the record does not support an award of punitive damages against either defendant.

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18. To be sure, Kitts testified that he presented the grievance to the Committee and asked that it be accepted, and Melton testified to the same effect. Whether Kitts made a "strong and complete" presentation at the hearing as the appellants suggest in their brief was a factual issue resolved against them by the jury. The jury may have discounted the testimony of Kitts and Melton due to their demeanor, the Local's past favoritism to Yellow drivers, and Butler's testimony.

19. On this issue, *see Williams v. Pacific Maritime Association*, 421 F.2d 1287, 1289 (9th Cir. 1970); *Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co.*, 298 F.2d 277 (3rd Cir. 1962). *Cf. Richardson v. Communications Workers of America*, 443 F.2d 974 (8th Cir. 1971) (reversing District Court's dismissal of an employee's claim for damages for mental distress).

The conspiracy count against the Employer and the Local was voluntarily dismissed by Butler, and there was no evidence that the Employer did anything more than go along with the Local's desires. Under such circumstances, it was not proper for the District Court to allow an award of punitive damages against Yellow.

The Local's conduct was not the type of outrageous or extraordinary conduct for which extraordinary remedies are needed; rather, it amounted to the commonly encountered policy of favoring one group of members over another, which lies in the mainstream of unfair representation litigation. Butler was not subjected to threats of violence, harassment, physical abuse, or the scorn and ridicule of his co-workers, and there was no showing that the Local acted with any malice directed specifically at him. *Compare Richardson v. Communications Workers of America*, 443 F.2d 974, 983 n.12 (8th Cir. 1971). The federal courts should fashion remedies under the labor statutes which are necessary to achieving the goal of industrial peace. *Textile Workers of America v. Lincoln Mills*, 353 U.S. 448, 454-455 (1957). The plaintiff did not establish that punitive damages were needed to deter future misconduct[20] or to prevent industrial strife.

V. THE SCOPE OF EQUITABLE RELIEF.

The appellants complain of two aspects of the court's equitable relief. First, the appellants urge that it was improper for the court to invite the plaintiff, at the close of all the evidence, to amend the complaint to seek an order fixing his seniority date. We see nothing improper

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20. If the Local had persisted in its post-trial policy of encouraging grievances in opposition to Butler, see p. A23, *infra*, we would be faced with a different situation.

in the trial court's conduct. To the contrary, it is within the spirit of Federal Rule of Civil Procedure 54(c):

> * * * [E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

See Stewart v. Banks, 397 F.2d 798, 799 (5th Cir.), *cert. denied*, 393 U.S. 801 (1968). It was within the court's discretion to decide that equitable relief was more appropriate than an award of damages requiring speculation about future lost earnings. *See De Arroyo v. Sindicato de Trabajadores Packinghouse, AFL-CIO*, *supra* at 290-292. We cannot agree with the appellants that the court, in awarding such relief, failed to adequately consider the interests of absentees, for those interests had been consistently advanced by the Local throughout the trial.

Second, the appellants complain of an injunction entered several months after judgment and permanently restraining them from

> * * * interfering with or in any manner disturbing plaintiff's seniority status, including the processing or advocating of all grievances that are in opposition to the plaintiff's said seniority status * * *.

The appellants urge that the court lacked power to issue this order without first joining as indispensible parties those Yellow drivers whose seniority status was adversely affected by the earlier order fixing Butler's seniority date. They contend that presence of the nonparty employees was indispensible because the order has the effect of permanently fixing their seniority and strips them of their collective bargaining rights to present grievances, all without notice, hearing or participation.

The factual background of this post-trial order was as follows: Subsequent to the court's judgment fixing Butler's seniority date, the Local posted a notice over the signature of Kitts suggesting[21] that the Yellow drivers adversely affected by Butler's new seniority status file grievances.[22] As a result, fourteen drivers filed identical grievances, the disposition of which, Kitts informed Butler by letter, "may affect your seniority." The court's order had the direct result of precluding a hearing on those grievances.

We find no error in the court's post-trial order. From the record, it seems clear that all fourteen of the grievances enjoined by the order complained solely of seniority loss occasioned by the grant to Butler of the May 6, 1959, seniority date,[23] and sought solely to take away that grant as a discriminatory one. We construe the injunction to

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21. At oral argument, counsel for the Local conceded that this verb fairly characterizes the Kitts notice.

22. The notice read:

> Attention All Road Drivers
> Baxter Springs Terminal
>
> On July 11, 1973 in the federal district court William Becker Chief Judge took the position that Billy G. Butler's seniority date is May 6, 1959 and that such seniority date is to be dovetailed with the seniority dates of all the other over the road truck driver employees of Yellow at its Baxter Springs, Kansas terminal.
>
> Local Union 823 has filed post trial motions asking the court to set aside this seniority date.
>
> Any road driver affected by this May 6, 1959 seniority date of Billy G. Butler has a right under Article 45 of the Central States Area Over the Road Supplemental Agreement to file a grievance with Local 823 which will be handled under this particular article.

23. A letter from Kitts to the fourteen grievants, attached to the plaintiff's petition seeking the post-trial order, declares:

> * * * All the grievances involve claims of discrimination because of the grant by Yellow Freight Systems, Inc., to Mr. Billy G. Butler of a seniority date of May 6, 1959.

prohibit only the processing of such direct attacks on the District Court judgment. We see nothing in the order which would prohibit the Local from processing seniority grievances based entirely on issues which were not litigated and settled by the court. It was the court's purpose to assure that Butler's seniority date would remain fixed at May 6, 1959, and it was precisely that date which the fourteen grievances sought to upset. In forbidding the processing of such grievances, the order simply recognized the rule of res judicata.

The appellants' contention that the adversely affected employees were not represented in the District Court action is without merit. It was the task of the Local to represent their interests, and the record indicates that it has done so vigorously, even to the point of prosecuting this appeal. It is not for the Local to decide in post-trial grievance proceedings that its own actions have been unfair to the other Yellow drivers, thus giving it the right to defy the court order. Merely to state the theory is to expose it as frivolous.[24]

Accordingly, the cause is remanded to the District Court for the purpose of amending the judgment to delete

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24. The two cases cited by the appellants in support of their argument that the absent employees were indispensible parties are inapposite. In *Bremer v. St. Louis Southwestern R.R. Co.*, 310 F.Supp. 1333, 1339-1340 (D. Mo. 1969), the District Court merely required that an employee who was suing her employer on a sex discrimination charge join the union and the one employee holding the disputed position as parties defendant. In *Nix v. Spector Freight System, Inc.*, 264 F.2d 875, 877 (3rd Cir. 1959), the court similarly held that a group of employees suing their employer to gain greater seniority had to join as defendants *either* the union *or* the other group of employees. Obviously, in neither of those suits were the adversely affected parties represented at all prior to the joinder. Here, on the contrary, the Local was named as a defendant—thus complying with the *Nix* decision —and it consistently championed the rights of the other employees.

any reference to punitive damages, and in all other respects the actions of the District Court are affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

The order of the District Court denying defendants' motions for judgments notwithstanding the verdict and for new trial is recorded at 374 F. Supp. 747 (W.D. Mo. 1974).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

74-1342
September Term, 1974

Billy G. Butler,
Appellee,

vs.

Local Union Number 823, etc.,
Appellant.

74-1567
Billy G. Butler,
Appellee,
vs.
Yellow Freight System, Inc.,
Appellant.

Appeals from the United States District Court for the
Western District of Missouri

The Court having considered petitions for rehearing en banc filed by counsel for appellants and, being fully advised in the premises, it is ordered that the petitions for rehearing en banc be, and they are hereby, denied.

Considering the petitions for rehearing en banc as petitions for rehearing, it is ordered that the petitions for rehearing also be, and they are hereby, denied.

April 9, 1975

APPENDIX D

NATIONAL MASTER FREIGHT AGREEMENT
AND CENTRAL STATES AREA OVER-THE-ROAD
SUPPLEMENTAL AGREEMENT
For the Period February 1, 1964 to March 31, 1967

* * *

ARTICLE 5

Section 3. (a) In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved.

(8) The parties acknowledge that specific situations may arise which may not be covered by the above rules, or in which the parties may feel that different treatment of the problem is necessary. In such situation the Employer, the Unions involved, and the Area Committee may mutually agree to such disposition of the seniority problems, as in their judgment is appropriate under the circumstances. The Change of Operations Committee under the Local Supplements or the National Master Agreement shall have the authority to add to or to modify these rules in specific situations presented to it.

ARTICLE 42

Section 1. The Employers and the Unions in each of the following states shall together create a permanent Joint State Committee for such state: Michigan, Ohio (including Wheeling, West Virginia), Indiana, Kentucky (including West Virginia except Wheeling), Illinois, Wisconsin, Minnesota, Iowa, Missouri, North Dakota, South Dakota, Nebraska, Kansas, and Denver, Colorado. The Joint State Committee shall consist of an equal number appointed by Employers and Unions but not less than three from each group. Each member may appoint an alternate in his place. The Joint State Committee shall at its first meeting formulate rules of procedure to govern the conduct of its proceedings. Each Joint Committee shall have jurisdiction over disputes and grievances involving Local Unions or complaints by Local Unions located in its state.

Section 5. It shall be the function of the various committees referred to above to settle disputes which cannot be settled between the Employer and the Local Union in accordance with the procedures established in Section 1 of Article 43. All committees established under this Article may act through sub-committees duly appointed by such committee.

ARTICLE 43

Section 1. The Union and the Employers agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of settlement, as provided for in this Agree-

ment, and in the National Agreement, if applicable, of any controversy which might arise. Disputes shall first be taken up between the Employer and the Local Union involved. Failing adjustment by these parties, the following procedure shall then apply:

(a) Where a Joint State Committee, by a majority vote, settles a dispute, no appeal may be taken to the Joint Area Committee. Such decision shall be final and binding on both parties.

* * *

APPENDIX E

MISSOURI-KANSAS GRIEVANCE COMMITTEE

AUGUST 2, 1967

* * *

Case No. 63 Local Union No. 823 and Yellow Transit Freight Lines Article 5 (Billy G. Butler)

FACTS: Claimant filed claim to change his terminal seniority at Baxter Springs, Kansas. The claimant was assigned to Baxter Springs following a change of operation and was granted seniority as of his arrival in Baxter Springs in compliance with the change of operations decision. A complete review of the circumstances disclosed that the Company did comply with the change of operations decision in the assignment of seniority to the claimant at Baxter Springs.

DECISION: Based on the facts presented, the Committee finds that the claim of the Union is denied.

Case No. 64 Local Union No. 823 and Yellow Transit Freight Lines Article 5 (Billy G. Butler)

FACTS: This is a companion case to Case No. 63 above—however in this case the employee claimed moving expense from Cheyenne, Wyoming, to Baxter Springs, Kansas. The Company maintained that moving expense was not due under the provisions of the contract inasmuch as the driver did voluntarily accept a job assignment at Baxter Springs, Kansas, and was not required to move there to follow work transferred to that point.

DECISION: Based on the facts presented, claim of the Union is denied.

Supreme Court, U. S.
FILED
OCT 1 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-1434 and 75-41

YELLOW FREIGHT SYSTEM, INC.,
Petitioner,

and

LOCAL UNION NO. 823, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

vs.

BILLY G. BUTLER,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1974

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YELLOW FREIGHT SYSTEM, INC.,
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and

LOCAL UNION NO. 823, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

vs.

BILLY G. BUTLER,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

I. A. Is it ever proper for a majority of a union to deprive the minority of contractual benefits to which they are clearly entitled?

B. Should the standard of conduct in an unfair representation case be something other than the duty fairly to represent the individual union member without arbitrariness, discrimination or bad faith?

II. Should the District Courts be denied the flexibility provided by this Court's decision in *Vaca* v. *Sipes*[1] to fashion appropriate remedies in unfair representation cases?

1. 386 U.S. 197 (1967).

STATEMENT OF THE CASE

Respondent adopts as an accurate statement of the case the recitations by the Court of Appeals in its opinion of the basic facts (YA. 2-3),[2] the applicable contract provisions in the collective bargaining agreement (YA. 13-16) and the nature of the representation of Billy G. Butler by the Union (YA. 19-20).

The statements presented by the petitioners, in contrast to the statement of facts of the Court of Appeals, understandably ignore the clarity of the collective bargaining agreement as to Butler's entitlement to full seniority and the discriminatory nature of the Union's attitude and actions toward Butler. Consequently, respondent offers its view of the facts consistent with the findings of the District Court and jury and the Court of Appeals.

This case involves the seniority which the terms of the collective bargaining agreement afforded to Butler, an over-the-road truck driver, when the business of his employer, the Watson-Wilson Transportation Company, was acquired by Yellow.

Yellow's operating authority had extended only to Amarillo, Texas, whereas that of the Watson Line had extended beyond Amarillo (A. 154). Yellow in order to obtain this extended authority had agreed to purchase Watson-Wilson in 1965, receiving temporary authority from the Interstate Commerce Commission to operate the latter in March of that year (A. 80-81, 128-129).

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2. References to Appendices herein cited are references to Appendices found in petitioner Yellow's Petition for Writ of Certiorari designated "YA", petitioner Union's Petition for Writ of Certiorari designated "UA", the printed Appendix in the Court of Appeals designated "A" or the trial transcript designated "R".

Yellow and Watson had a collective bargaining contract with the Teamsters Union in effect during the merger process which provided with respect to mergers as follows:

> §3(a)(1) If both carriers involved are solvent then the seniority lists of the two Companies should be dovetailed so as to create a Master Seniority List based upon total years of service with either Company. This is known as dovetailing in accordance with years of seniority. * * *
>
> * * *
>
> §3(a)(8) The parties acknowledge that specific situations may arise which may not be covered by the above rules, or in which the parties may feel that different treatment of the problem is necessary. * * * The Change of Operations Committee * * * shall have the authority to add to or modify these rules in specific situations presented to it (A. 234-236).

Due to its impact upon the 350 to 400 drivers (A. 140-141) involved, the effect of such a merger upon the seniority of the employees of the two lines was the subject of a meeting of representatives of the employers and local unions involved, identified as the Change of Operations Committee. At a meeting in Chicago, Illinois, on June 16, 1965, this committee issued its formal ruling (UA. 10) that:

> ". . . All displaced employees . . . shall be placed on the master seniority list with the original date of hire, regardless of the terminals they may have worked in where they had accumulated only terminal seniority . . . ."

No such "master seniority list" combining Watson and Yellow employees was then prepared; instead separate lists were maintained for the Watson employees and for the Yellow employees (R. 161). On June 30, 1965, the em-

ployees on the separate Watson list received a letter notice of the availability of jobs at some eight locations, including Baxter Springs, Kansas. Butler returned the form letter notice with an indication that Baxter Springs was his first choice (A. 69). After all the letters had been returned, assignments to available jobs were made in accordance with the man's preference and consistent with his seniority. As a result of this first letter, some nine former Watson employees obtained work at Baxter Springs.

On August 5, 1965, a second series of letters were sent out to all Watson employees who did not have enough seniority to obtain the job of their choice in response to the June letter (A. 146-147). Again, Butler indicated Baxter Springs as his first choice (A. 70). Again, Butler was advised that he could not be placed at Baxter Springs at the time since there were many other bidders with higher seniority (A. 71-72). As a result of that second bidding, an additional nine former Watson drivers secured employment at Baxter Springs. During this period had the dovetailing provided for in the contract been accomplished Butler would have been working.

By August 3, 1966, Yellow's authority from the Interstate Commerce Commission to operate Watson-Wilson had become final. Still the former Watson drivers continued to be carried on a separate seniority list. It was not until after another meeting held in Chicago on September 20, 1966, that some "dovetailing", combining names from the separate lists, was effected. The seniority roster posted on September 26, 1966 included the first group of nine Watson employees dovetailed among the Yellow employees by their company seniority dates (A. 162-194). The second group of nine remained at the bottom of the list (A. 82), credited with seniority only from their arrival at Baxter Springs. Certain of the employees in this second group

then filed grievances with the Union and charges with the National Labor Relations Board protesting their reduced seniority (A. 62). On the day these grievances were to be heard, Mr. Roy Williams, an officer of the International Union, told Mr. William Kitts, the Business Agent of Local 823, that Kitts was mistaken in not affording the second group their company seniority, and that all employees should have been dovetailed (A. 197). Further discussion of the grievances was abandoned and the grievants succeeded in obtaining their full company seniority (A. 87, 92, 120). Finally, on December 16, 1966, Yellow posted a seniority roster which showed all former Watson employees dovetailed among the Yellow drivers (A. 82) with full company seniority—all except Butler (A. 62, 92).

On March 15, 1967, Butler, along with several other Watson-Wilson men, received a letter of recall, calling him for work at Baxter Springs, Kansas (A. 75, 148-149). In the interim, Butler had turned down several jobs because they did not afford him his full seniority (A. 72-73). Yellow had in the meanwhile been hiring "casuals" to fill in for men because of vacation, illness, or for extra loads, etc. (A. 158). Butler reported to work at Baxter on March 27, 1967 (A. 754). It should be noted that on his company record Butler's seniority date was May 6, 1959 and the record was so marked (A. 804).

On July 5, 1967, having then accumulated his total moving expenses, Butler filed formal grievances complaining that he was not being afforded his full company seniority, that junior men had been hired at Baxter ahead of him (A. 94) and for reimbursement of his moving expense. He first discussed the grievance with the president of the local, Mr. Floyd Webb, who told him that he would "guarantee" that it would be lost when it came up for hearing (A. 944). When Butler asked to attend the hear-

ing on his grievance, he was told that he couldn't go (A. 97). The hearing consisted of the reading of the grievance by Kitts and the presentation by the employer of what it purported to be Butler's reply to the June 30, 1965 bid, that which first offered Watson drivers employment at Baxter Springs. Contrary to Butler's testimony (A. 69) that he had marked the reply form to indicate his desire to be employed at Baxter Springs, the employer apparently exhibited a copy of the form on which the only box marked was that indicating that the recipient did not wish to be considered for any of the offered locations (A. 151, 192, UA. 26). No one present denied the authenticity of such letter. Butler's response to the August 5 letter, also indicating a choice for Baxter, was not mentioned (UA. 28).

Butler first learned of the results of the hearing in a conversation with Kitts who advised that he had been turned down because of a letter in which he had refused to come to work at Baxter (A. 98). There was no discussion of any subsequent change of operations decision or period of temporary control. This was followed by a letter from Kitts advising that the grievance had been denied and that Butler's assignment to Baxter had been in compliance with a change of operation decision. All Butler's subsequent efforts to obtain assistance from his union official were unavailing (A. 98, 107), requiring him to seek the assistance of private counsel (A. 107).

In April of 1970, there was a general lay-off of employees at the Baxter Springs terminal. When Butler learned that men with less company seniority were being recalled to work ahead of him, he complained to Kitts who asked him "to go back to Wyoming, and get out of his hair." Kitts also acknowledged that he had scratched Butler's name off of the seniority list being used for the recall (A. 105). Butler was ultimately recalled and continued to

work with his diminished seniority until the District Court below declared him entitled to his full seniority. According to the verified Petition for Order to Show Cause filed October 2, 1973 (A. 45) representatives of the Union posted at the terminal, over the signature of Kitts, a notice that Chief Judge Becker "took the position that Billy G. Butler's seniority date is May 6, 1959" and inviting the other drivers to file grievances about such ruling. As a result of such activity and other more direct urgings, the Petition alleged some fourteen other drivers filed identical grievances. In response, Chief Judge Becker entered temporary (A. 48) and permanent (A. 52) injunctions against the prosecution or advocacy of grievances in opposition to Butler's seniority status as adjudged or otherwise contravening the lawful orders of the Court.

After the trial in the District Court on the breach of contract and unfair representation causes of action the jury returned verdicts against both defendants. The jury awarded $6,500 actual and $30,000 punitive damages against the Union, and $28,000 actual and $7,000 punitive damages against Yellow. The award of the punitive damages against both defendants was reversed by the Court of Appeals, but in all other respects, the actions of the District Court were affirmed.

ARGUMENT

Respondent believes that petitioners have wholly failed to establish any grounds upon which review of this case by this Court is justified or necessary.

This case in plain and simple terms involves the seniority which the terms of the applicable collective bargaining agreement clearly afforded Butler but which his employer and union chose to subvert during the processing of his

grievance over loss of that seniority in a manner clearly evidencing arbitrariness, discrimination and bad faith. Both the District Court and the Court of Appeals determined that the collective bargaining contract was not the least bit ambiguous and the District Court, its jury and the Court of Appeals found that the contract had been breached by Yellow and that the fair representation standard imposed upon the Union had been violated.

The petitioner Union's argument that this case deserves review because it involves important questions on the internal political processes of a local union does make the case appear to be more interesting but the questions raised relating to internal union politics, in fact, have nothing to do with this case and are totally irrelevant.

The Union's defense that its attitude and actions toward Butler were politically motivated can be relevant only if the applicable terms of the collective bargaining contract are totally ignored. The contract which was found by the District Court and the Court of Appeals to be wholly unambiguous provided that Butler was entitled to be granted his company seniority based upon his original employment date with Watson in May of 1959. In short, the simple response to the Union's argument that the majority must rule in a union is that it is never proper for a majority of a union to deprive the minority of *contractual benefits* to which they are clearly entitled. *Corcoran* v. *Allied Super Markets*, 498 F.2d 527, 530 (8 Cir., 1974) A review of the applicable contract provision set forth in the statement of the case herein will reflect just how clear and unambiguous the contract was on seniority.

Petitioner Yellow more directly attacks the issues in this case by raising the question in its Petition of the need for changing the standards for determining liability in unfair representation cases. However, this Court has con-

tinuously held for over twenty years that a breach of the duty of fair representation occurs when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith. *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967); *Humphrey* v. *Moore*, 375 U.S. 335, 349-350 (1964); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337-339 (1953). This standard has worked for twenty years and is no less viable today.

The essence of Petitioner Yellow's argument, as supported by that of the Union, seems to be alternatively that either the standard should be changed so that the Union, out of political necessity, can act in an arbitrary and discriminatory manner or in bad faith as to members of the bargaining unit, or that under the facts of this case the Union's conduct was not arbitrary, discriminatory or carried out in bad faith. The first suggestion is incredulous, and the second, which actually relates to the sufficiency of the evidence or the nature of the facts in the case, was appropriately handled by the District Court and jury and, being wholly factual in nature, is hardly a matter requiring or deserving review by this Court.

It should be noted that having reviewed the evidence the Court of Appeals found in Butler's favor while recognizing the parameters of the standard of conduct set out in *Vaca* v. *Sipes, supra*. The Court noted "[w]e stress . . . that we do not hold here that the mere fact that a District Court ultimately disagrees with a union's interpretation of a collective bargaining agreement is sufficient in and of itself to establish a case of unfair representation." (YA. 20). The same principle as stated in *Vaca* v. *Sipes* at 386 U.S. 195 was that a "breach of duty of fair representation is not established merely by proof that the underlying grievance was meritorious. . ." In Butler's case, however, the lower courts and the jury, weighing the union conduct

in light of the standard, justifiably found that the Union's conduct was arbitrary, discriminatory, or carried out in bad faith. Respondent believes those hard core findings of fact are truly at the heart of the Petitioners' complaints set forth in their petitions as opposed to their assertions about the need for a different standard of conduct.

A review of the jury's verdicts assessing both actual and punitive damages against both Yellow and the Union, including a disproportionately large amount of punitive damages against the Union, clearly indicates that from an evidentiary and factual standpoint the jury considered both parties' conduct, and particularly that of the Union, to have been worse than merely arbitrary, discriminatory or reflecting bad faith. In this respect it should be remembered that at the heart of the decision in this case is the jury which was given the responsibility and duty to measure the conduct of the parties against the appropriate legal standard set down by this Court.

Petitioner Yellow claims that *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America* v. *Lockridge*, 403 U.S. 274 (1971), a post *Vaca* decision of this Court, substantially altered the standard of conduct in unfair representation cases. Based upon our review of *Lockridge*, we find this assertion to be totally without merit.

The focus of the Court in *Lockridge* was on the jurisdictional question of preemption. The Court's reference to the standard of conduct established by *Vaca* v. *Sipes* was limited and, in respondent's view, did nothing more than affirm the standard of *Vaca*. The Court in *Lockridge* at 403 U.S. 300-301 stated:

> "For such a claim to be made out, Lockridge must have proved '*arbitrary or bad-faith* conduct on the

> part of the Union.' *Vaca* v. *Sipes, supra*, at 193, 87 S.Ct., at 918. There must be 'substantial evidence of fraud, *deceitful action or dishonest conduct*.' *Humphrey* v. *Moore, supra*, 375 U.S., at 348, 84 S.Ct., at 371. * * * Whatever the underlying motive for expulsion [of Lockridge from the Union] might have been, this case has been submitted and tried on the interpretation of the contract, not on a theory of *discrimination*." (Emphasis added)

Clearly, this language recognizes and affirms the *Vaca* standard while describing alternative degrees of culpable conduct, and most importantly affirms the standard applied by the lower courts in this case.

Petitioner Yellow further cites *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944) suggesting that it indicates a different standard. Aside from the fact that the *Steele* case dealt with a situation involving a union's representation of workers who were not members of the union, a fact distinguishing it from this case where Butler was a member of the Union and specifically covered by the contract, respondent finds the *Steele* case to be consistent with the standard set out in *Vaca* v. *Sipes, supra*, *Humphrey* v. *Moore, supra*, and *Ford Motor Co.* v. *Huffman, supra*, which cases further and more clearly defined the standard after *Steele*. Respondent would suggest that any reference to hostility in *Steele* was made in the context of the racial discrimination there involved. The "hostility" arising from the racial discrimination there involved was merely descriptive of the specific facts of the case and termed by the Court as "invidious."

Petitioner Yellow further requests the Court to grant certiorari to review the Court of Appeals decision with respect to the statute of limitations question involved herein.

The District Court held that the action against Yellow and the Union was based on a written contract and consequently that a five-year period for actions based on written contracts applied. The Court further held that under the doctrine of *Vaca* v. *Sipes, supra,* 386 U.S. at 186-187, Butler had no "fully vested" cause of action against Yellow or the Union until Butler had exhausted the grievance procedures provided for in the contract. Since the adverse Grievance Committee decision of August 2, 1967, was rendered within five years of Butler's commencement of suit on June 8, 1972, the Court held that the suit was not barred. The court of appeals agreed with the analysis.

Both of the lower courts in this case were correct in following the court's decision in *Vaca* v. *Sipes, supra,* and their reasoning is absolutely appropriate. The cause of action as to both Yellow and the Union is premised on the written collective bargaining agreement. As to petitioner Yellow, the cause of action was conceived on March 29, 1967, when it initially breached the collective bargaining agreement with respect to Butler's seniority. Nevertheless, the agreement in itself provided for a process or mechanism to resolve disputes or potential disputes and that process, the grievance procedure, was a part of the written agreement. The carrying out of the grievance process merely meant the parties were operating within the framework of the contract in an on-going relationship governed thereby. In a sense one could say the contract lived. To be sure, had Butler immediately filed suit against Yellow before filing his grievance, his case would have been dismissed due to his failure to exhaust his contractually provided administrative remedies. Further, as the district court and court of appeals determined, Butler was clearly entitled to presume that his seniority rights emanating from the contract would be fully protected by

the Union through its representation of him in the administrative process provided by the contract.

The lower courts' perception of these facts led them to properly determine that the causes of action against both Yellow and the Union were clearly based on and emanated from the collective bargaining contract. Thus, the causes of action against both Yellow and the Union did not accrue until Butler's grievance was rejected in August, 1967, and the necessary condition precedent to suit had been met. *Vaca* v. *Sipes, supra; Republic Steel Corp.* v. *Maddox,* 379 U.S. 650, 653 (1965); see also *Dill* v. *Greyhound Corp.,* 435 F.2d 231, 237 (6th Cir., 1970), *cert. denied,* 402 U.S. 952 (1971).

Respondent believes that the decisions of both of the lower courts herein clearly follow the prior decisions of this court setting down guidelines for the lower courts for handling unfair representation types of cases and instructing those courts to fashion appropriate remedies to foster the policies underlying federal labor law. Court of Appeals Opinion (YA. 6-8), quoting *Vaca* v. *Sipes, supra; Textile Workers of America* v. *Lincoln Mills,* 353 U.S. 448, 454-455 (1957). The exact approach suggested by *Vaca* has produced the proper action by the lower courts in this case including proper consideration by them of, and application of the appropriate statute of limitations in development of a viable workable remedy to protect Butler's rights guaranteed by the federal labor law. Clearly, the flexible standards of this court are working and do not need changing. Perhaps, the only alternative to the type of result reached in this case on the choice of the statute of limitations is enactment by Congress of a federal statute of limitations. This is true because even if the characterization of the cause of action is made uniform, the various

states[3] will still have statutes providing different periods of limitations for the same cause of action. Moreover, it is questionable whether there should be a uniform characterization because factual patterns will vary on a case by case basis, and the uniform characterization might well hamper the district courts in fashioning workable remedies in the variety of potential situations which might arise under widely varying contractual arrangements. In any event, Congress is the appropriate form.

Respondent cannot close without saying that it is unfortunate that the Court of Appeals in this case felt it necessary to disturb the jury verdicts granting punitive damages against both defendants, which disproportionate verdicts indicated efforts by both the District Court and the jury at fashioning remedies against Yellow and the Union appropriate relative to their respective conduct. The jury awarded $6,500 actual and $30,000 punitive damages against the Union, and $28,000 actual and $7,000 punitive damages against the employer.

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3. It is interesting to note, however, that in Missouri, for example, where the District Court in this case was located, the period of limitations for actions on written contracts, oral contracts, torts and liabilities created by statute is five years. Section 516.120, R.S.Mo. 1969.

CONCLUSION

The Petitions for Writ of Certiorari should not be granted because the decision of the Court of Appeals for the Eighth Circuit is not in conflict with any decision of this Court. Further, the Court of Appeals has decided the issues raised entirely in accordance with principles laid down by this Court and in harmony with decisions of the other Courts of Appeals which have rendered decisions on the issues herein raised.

Respectfully submitted,

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